(31)

IN THE
Supreme Court of the United States

OCTOBER TERM, 1942. No. 198

NORMAN C. SHALLER
Petitioner

v.

CITY OF PHILADELPHIA

ANSWER AND BRIEF OF CITY OF PHILADELPHIA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The answer of the City of Philadelphia to the petition for writ of certiorari to the Superior Court of Pennsylvania, respectfully represents:

1. The petition prays that a writ of certiorari issue herein to review a certain final decision of the Superior Court of the State of Pennsylvania. This final decision was rendered by the Superior Court of Pennsylvania on March 13, 1942; whereas the petition for writ of certiorari was filed in this Court on July 2, 1942, which is more than three months after the entry of the final judgment by the Superior Court.

2. The jurisdiction of the Superior Court of Philadelphia County is final in all appeals from judgments entered in the Municipal Court of Philadelphia County.

ACT OF MARCH 2, 1923, P. L. 3, Sec. 1; 17 PS 187.

3. The judgment in this case with all costs was paid by the petitioner on May 5, 1942 and, even if successful in reversing the decision of the Superior Court, the petitioner would not be entitled to an order of restitution.

ALLEGHENY BANK'S APPEAL, 48 Pa. 328, 334.

4. The petitioner is in error in arguing that on December 13, 1939, when the City of Philadelphia adopted the Income Tax Ordinance, the law had not been definitely settled that a State or any of its political subdivisions could not include in a general non-discriminatory income tax the compensation received by federal employes. This Court, prior to December 13, 1939, in GRAVES v. O'KEEFE, 306 U. S. 466, 83 L. Ed. 927; 120 A. L. R. 1466 held that a tax on income is not a tax on its source, as it is measured by income which becomes the property of the taxpayer when received for his service; and the tax laid upon the privilege of receiving it is paid from his private funds and not from the funds of the Government, either directly or indirectly.

The principle that a tax on income is not a tax on its source was recognized by this Court long before its decision in the GRAVES v. O'KEEFE case. Consequently, on December 13, 1939, the City of Philadelphia, having been given the power by the State to tax incomes, had the right to adopt a general non-discriminatory income tax which included the salaries received by federal employes residing in Philadelphia.

5. The petitioner is in error in arguing that the City has no right to tax the income of residents of Philadelphia earned outside of Philadelphia, for in SHAFFER v. CARTER, 252 U. S. 37, 57; 64 L. Ed. 445, 448, this Court said, in upholding an Oklahoma Income Tax:

"As to residents it *may*, and it does, exert its taxing power over their income from all sources, whether within or *without* the State."

6. The decision by the Superior Court of Pennsylvania that when a former decision is overruled, the reconsidered pronouncement will be treated as the law from the beginning, involves a principle of substantive law, and the decision of the highest court of this State on that question is binding on the Federal Court.

ERIE v. TOMPKINS, 304 U. S. 64, 82 L. Ed. 114 A. L. R. 1487.

7. Likewise, the construction of the STERLING ACT of August 5, 1932, P. L. 45, 53 PS 4613 by the highest court of the State of Pennsylvania is binding on the Federal Courts. Consequently, the decision of the Superior Court of Pennsylvania in this case that the City of Philadelphia had the power under the STERLING ACT to adopt the Income Tax Ordinance of December 13, 1939, is conclusive upon the Federal Court.

8. The petitioner's contention that Congress, in adopting the Act of October 9, 1940, 54 Stat. 1060, 4 U. S. C. A., Sec. 14, impliedly prohibited a State or Governmental agency from including in a non-discriminatory income tax the income received from the federal government, has no merit, and is fully answered in the opinion of the Superior Court, and on pages 16 and 17 of the brief of the City of Philadelphia filed in the Superior Court, which brief accompanies this answer. In any event, the petitioner in this case is in no position to avail himself of that argument, because he is a resident of Philadelphia. The statement of claim, which appears on pages 3 and 4 of the transcript of record, discloses in paragraph 6 that in March of 1941 he voluntarily made and filed with the Receiver of Taxes a return indicating that he earned during the year 1940 the

sum of $2,596.73, on which amount he owed a tax of $38.95, and at the same time voluntarily delivered to the Receiver of Taxes a check as payment on account of said tax; and in paragraph 7 that he stopped payment on the said check. Under the authority of SHAFFER v. CARTER, *supra,* his income would be taxable whether earned within or without the City of Philadelphia.

9. The contention by the petitioner that if he is compelled to pay this tax the defense work of the Government would be seriously and dangerously interfered with, is absurd, as it has no basis in fact or law. The petitioner is not in the military or armed forces of the Government; besides, this Court has already held that a tax on income is not a tax on its source. Consequently, the tax on the income of the petitioner, not being a tax on its source, could in no way interfere or hamper the defense work of the government.

10. Since the basic question involved in this case, namely, whether a tax on income is a tax on its source, has been decided on so many occasions by this Court, there appears no reason why it should be reviewed again.

Wherefore the City of Philadelphia prays your Honorable Court to dismiss the petition for a writ of certiorari.

And defendant will ever pray.

CITY OF PHILADELPHIA.
By WALTER CAMENISCH,
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